# BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

ALFONSO ORTIZ  Claimant	)
VS.	) ) ) Docket Nos.180,732; 181,965
EXCEL CORPORATION  Respondent  Self-Insured	) 180,733; 181,964 ) )
AND	)
KANSAS WORKERS COMPENSATION FUND	)

### ORDER

Claimant appeals from two Awards, each involving two separately docketed claims, both entered December 4, 1997. Docket Nos. 180, 733 and 181, 964 involve claims of injury to both upper extremities and shoulders. Docket Nos. 180,732 and 181,965 involve claims of injury to claimant's right knee, hip and back. The Appeals Board heard oral argument on June 24, 1998.

#### **A**PPEARANCES

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Rebecca W. Crotty of Garden City, Kansas.

#### RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

#### **ISSUES**

This case involves four docketed claims but only two injuries. The claims were consolidated for trial. The Administrative Law Judge issued two Awards, one for each injury. The Award in Docket Nos. 180,733 and 181,964 involves alleged repetitive trauma

180,733; 181,964

injuries to both shoulders and his left elbow and wrist. March 1, 1993, has been used as the date of accident and neither party contests use of that date. The Award in Docket Nos. 180,732 and 181,965 involves alleged injury to his right knee and back on May 18, 1993. The claims will hereafter be referred to only by the later docket numbers, Docket No. 181,964 for the injury to the shoulders, left elbow, and wrist, and Docket No. 181,965 for injury to the right knee and back.

The issues to be considered are the same in each case: (1) what is the functional impairment; and (2) is claimant entitled to work disability and, if so, what is the extent of the work disability? In Docket No. 181,964, the ALJ found 15 percent permanent partial impairment to the left upper extremity but found no permanent injury to either shoulder. In Docket No. 181,965, the ALJ awarded benefits for 5 percent permanent partial impairment to the right lower extremity but found no permanent impairment to the back. The ALJ also found claimant was terminated from his employment with respondent for engaging in a fight and ruled that claimant would not, for that reason, be entitled to a work disability. On appeal claimant contends that he is entitled to a general body functional impairment which includes both shoulders and the low back. Claimant also contends he did not initiate the fight for which he was terminated, he only defended himself, and he is entitled to a work disability. Respondent asks the Board to affirm the award, in part because claimant did not send a submission letter identifying the issues raised on appeal.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Awards should be affirmed. But the Board has relied on a different factor in concluding claimant is not entitled to work disability. The Board concludes claimant has proven two separate scheduled injuries, not a general body disability, and for that reason is not entitled to work disability.

## Findings of Fact

- (1) Claimant began working for respondent in 1988. In the spring of 1993, his job was hanging chucks using a hook and knife, work which required that he reach above shoulder level. Claimant testified he began having problems with both shoulders. The parties have stipulated to a date of accident of March 1, 1993.
- (2) Claimant was referred first to Dr. R. C. Trotter. Dr. Trotter's notes, which include visits on March 30, April 21, May 20, and June 17, 1993, reflect that claimant complained of pain in his left shoulder and left hand but the records make no mention of the right shoulder. Claimant testified that the notes are wrong, that he did complain of pain in the right shoulder and Dr. Trotter said the left shoulder was worse than the right. Dr. Trotter referred claimant for physical therapy and the therapist notes show therapy for both shoulders. Dr. Trotter released claimant to return to full duty as of May 20, 1993. Claimant had been working on a light duty basis before that date.

3

- (3) On May 18, 1993, claimant fell at work and injured his right knee. He testified he also injured his low back at this time. At the time of this injury, claimant was working light duty. Claimant testified he was taken to the company nurse who treated the knee with cold.
- (4) On June 18, 1993, respondent terminated claimant for fighting with a coworker. Claimant testified that at the time of his termination he was having problems with his right knee, back, shoulders, left elbow, and left hand.
- (5) In November of 1993, respondent sent claimant to Dr. L. T. Fleske. Dr. Fleske's letter of November 3, 1993, a letter describing the first visit, mentions complaints to the left shoulder, left wrist, left hand, right knee and low back. His letter also mentions a popping in both shoulders and numbness from the fingers extending toward the elbow on the left as well as tingling in the left elbow. But Dr. Fleske expressed skepticism about the multiple complaints. He felt the only significant complaints were those relating to the elbow, which he thought may be an ulnar nerve entrapment and chondromalacia of the patella. He felt the shoulder problem was probably tendinitis to be treated by finding work where he would not need to work over the shoulder. He thought the left wrist, where he noted some crepitus, may be ligamentous or synovial tissue catching. He discounted the low back because he did not think the method of the injury and the pain were consistent.
- (6) In May 1994, Dr. Fleske performed arthroscopic surgery on claimant's right knee, shaving the chondromalacia. Dr. Fleske rated the impairment for the knee injury as 15 percent.
- (7) Dr. Fleske referred claimant to Dr. Robert G. Clark who performed surgery on claimant's left hand and elbow. Specifically, on January 18, 1995, he performed decompression of both the median nerve and the ulnar nerve on the left with an anterior nerve transposition.
- (8) Dr. Fleske also referred claimant to Dr. Pedro A. Murati for complaints of numbness in the left shoulder. Dr. Murati first saw claimant on January 4, 1994. Dr. Murati noted the nerve conduction study was consistent with carpal tunnel and cubital tunnel syndrome. He then thought the shoulder complaints were probably from the carpal tunnel and cubital tunnel syndromes. None of his findings were indicative of pathology in the left shoulder. Dr. Murati saw claimant again on February 8, 1995, after the median and ulnar nerve surgery. At that time claimant made no complaints concerning the left shoulder area. Claimant also made no complaint regarding the left shoulder on March 15, 1995. On April 12, 1995, Dr. Murati rated claimant's impairment as 15 percent of the left upper extremity for the carpal tunnel and cubital tunnel releases. He also recommended claimant do no work involving heavy grasping, elbow flexion greater than 90 degrees, more than occasional repetitive motion, lifting more than 20 pounds, or lifting more than 5 pounds on a constant basis. Dr. Murati found no permanent impairment in the left shoulder and did not examine claimant's right knee or back.

180,733; 181,964

(9) Claimant was examined and his injuries evaluated by Dr. Sergio Delgado at the request of claimant's counsel. Dr. Delgado rated claimant's impairment as 19 percent of the whole body. In addition to the left ulnar nerve, left median nerve, and chondromalacia of the right knee, for which surgery was done, he diagnosed lumbosacral sprain and his rating included 5 percent of the whole body for the back injury. He also diagnosed impingement syndrome of the left shoulder which he assigned an impairment rating of 6 percent of the left upper extremity. He recommended as work restrictions: avoid gripping/pinching with the left upper extremity; avoid cool temperatures at work; avoid repetitive pushing/pulling and repetitive activities overhead; and he agreed with the weight restrictions recommended by Dr. Murati.

### Conclusions of Law

- (1) Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).
- (2) In the claim assigned Docket No. 181,964, the Board finds claimant has permanent injury to his left elbow and wrist but not to either shoulder. In the claim assigned Docket No. 181,965, the Board finds claimant has permanent injury to the right knee but not the back.
- (3) Work disability is awarded only in cases involving an unscheduled injury. K.S.A. 44-510e. Claimant is, therefore, not entitled to a work disability in this case.
- (4) In the accident of March 1, 1993, (Docket No. 181,964) claimant sustained a 15 percent permanent partial impairment to the left upper extremity. In the accident of May 18, 1993, (Docket No. 181,965) claimant sustained a 5 percent permanent partial impairment to the right lower extremity.

#### AWARD

Docket No. 180,733 and Docket No. 181,964

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Kenneth S. Johnson, dated December 4, 1997, should be, and is hereby, affirmed.

Docket No. 180,732 and Docket No. 181,965

IT IS SO ORDERED.

180,733; 181,964

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Kenneth S. Johnson, dated December 4, 1997, should be, and is hereby, affirmed.

5

Dated this day of Jul	y 1998.
	BOARD MEMBER
	BOARD MEMBER
	BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
D. Shane Bangerter, Dodge City, KS
Rebecca W. Crotty, Garden City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director